Supreme Court, U.S.
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NO. 85-724

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN C. MANDANICI, JR.
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF THE PETITIONER

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On pages 2-7 of the Prosecution's Brief in Opposition, the Prosecution persistently refers to the earlier evidentiary review provided by the Court of Appeals in that Court's initial decision regarding the Petitioner's earlier claims on direct appeal that the evidence on all counts was insufficient to convict him. However, that earlier decision by the Court of Appeals did not concern the present Brady and Bagley issues but rather only concerned the sufficiency of evidence issue, and the Court of Appeals explicitly stated in its earlier decision that the evidentiary review it was providing was based on "(v)iewing the evidence in the light most favorable to the government" (Petitioner's Appendix to his Petition, p. A 22). This approach of the Prosecution in applying the Court of Appeals earlier and clearly pro prosecution review of the evidence to the

present Brady and Bagley claims repeats and accentuates a key error made by the lower courts concerning the present Brady and Bagley claim. As mentioned in the Petition for Certiorari, pp. 22-23, that error is that the lower courts in making a review of the evidence concerning this present Brady and Bagley claim relied heavily on and incorporated the Court of Appeals earlier review of the evidence made in the light most favorable to the Prosecution when the Court was deciding the earlier sufficiency of evidence claims on direct appeal. The Petitioner has claimed that a Brady and Bagley review of the evidence should not be made in the light most favorable to the Prosecution. Said earlier decision by the Court of Appeals is contained on Pages A13-A27 of the Petitioner's Appendix to his Petition and every reference by the

Prosecution in its brief to said pages is primarily a reference to a review of the evidence made in the light most favorable to the Prosecution.

On page 2, line 12 of the Prosecution's brief, it is stated that the Petitioner "sought rental subsidy benefits". However, the trial court itself noted that it was government housing officials who approached the Petitioner. The trial court stated that "Well, I had Mr. Gonzalez (a Prosecution witness and former head of the local federally funded housing authority, the B.H.A.) or -- I'm sorry -- I don't have my record in front of me. He said the (housing) situation was so desperate in Bridgeport that they went to Mr. Mandanici and said 'Please take these people' and I had a state official come in and said that was a violation of law to put people in housing without a contract, but the situation

in Bridgeport was so desperate that they kind of overlooked it" (Sentencing Transcript of June 10, 1983, p. 26). The Court had earlier noted that there was a dire need of housing in Bridgeport for low income people. (Ibid pp. 8, 16).

On Page 2, lines 22-23 of the Prosecution's Brief, it is stated that the Petitioner was only entitled to rental subsidies upon successful completion of the rehabilitation work. However, the final H.A.P. contract (Govt. Trial Exhibit 4), upon which the Petitioner was indicted (Count 3), does not contain a certification by the Petitioner that the work was completed but rather states in Sec. 1.3 (b) that the units have "been rehabilitated in accordance with the terms and conditions of the agreement to Enter into Housing Assistance Payments Contract (Agreement) or will be completed in

accordance with the terms on which the unit(s) was accepted" (emphasis added). Thus the final H.A.P. contract upon which the Petitioner was indicted in Count 3 did not require that all the work be completed.

On page 2, lines 23-24 of the Prosecution's Brief, it is stated that the Petitioner was entitled under the new Modern Rehabilitation program to rental subsidies from 100% to 140%. This again is an assertion adopted from the Court of Appeals evidentiary review made in the light most favorable to the Prosecution. However, no witness at trial ever testified that the Petitioner was told he would get less than 120% of the fair market rent under the new program. In fact, a Prosecution witness, David Gonzalez, who had been the director of the locally federally funded housing agency, the B.H.A., testified that prior to the

government housing contracts with the Petitioner which were involved in the present case, the Petitioner was already receiving 110% of the Government's version of the fair market rent pursuant to an earlier program entitled the Existing Section 8 program (Trial Trans. of February, March 1983, hereafter entitled T., pp. 178-179). Under that earlier Existing Section 8 Program, no rehabilitation or repair was required. Gonzalez testified for the Prosecution that the purpose for the Petitioner doing the rehabilitation work involved in the case was to qualify under new contracts (the subject of Counts 2 and 3 of the Indictment) for a new program entitled Modern Rehabilitation where he would receive another 10% of the Government's version of the fair market rents bringing his rental subsidy from 110% to 120% of

the said market rent for each unit (T. pp. 178-179). Gonzalez testified that the Petitioner did receive the 120% of the Government's version of the fair market rents under the new program (T. p. 179). Also, not only was the Petitioner never told he might get less than the 110% he was already receiving if he did the extra rehabilitation, but he was led to believe he could get 140% of the Government's version of the fair market rent. Gonzalez testified that he attempted to get the 140% from his H.U.D. supervisors but was unable to do so (T. pp. 189-193). It should be noted that the said fair market rent is determined solely by the Government and not by a neutral party (Hearing transcript of June 19, 1984, p. 117). In the earlier stages of the new program under the initial H.A.P. contract in December, 1980, the Petitioner did re-

ceive 120% of the Government's version of the fair market rent (T. pp. 179, 1150). That December 12, 1980 H.A.P. contract was not the subject of any count of the indictment (obviously because it was signed only 11 days after the Petitoner promised to do the work and no one would expect him to do the work in 11 days). Later, on July 1, 1981, the local federally funded housing authority, the B.H.A., presented the Petitioner with a new H.A.P. contract which was the subject of Count 3 and which contained lowered rents. The Petitioner was shown the new lowered rents and was told that if he did not sign the new contract then he would be left with 70 poor families already in the building under the program (Petitioner's testimony, T. pp. 1146-1149, 1168-1169).

On page 2, line 28 of the Prosecution's Brief, it is stated that it was the Petitoner who estimated the costs

of rehabilitation at $88,000.00. However, the Court of Appeals, even when it reviewed the evidence in the light most favorable to the Prosecution, held that it was not the Petitioner but a local federally funded housing official, Joseph Gambino, who did the detailed estimates from a cost estimate trade book (Petitioner's App. p. A24). It should be noted that the con racts that were the subject of the indictments were form contracts drafted by the Government (Govt. trial Exhibits 3, 4) and that various government housing officials stated that the pertinent Section 8 regulations were complicated (T. p. 33), were incomplete and that the matter involved a pilot program and that the paperwork was overwhelming and at times H.U.D. superiors provided different and contradictory answers (T. pp. 355-356). Thus the simple picture of the Section 8 program provided in the

Prosecution's Brief is incomplete.

On page 3, line 18 of the Prosecution's Brief, it is stated that the Petitioner did not complete the work. However, a primary reason he did not complete the work was that he had counted on the promised higher rents to pay for the rehabilitation and he did not get all that he was promised (T. pp. 975-978, 981, 997-998, 657).

On page 3, line 20 of the Prosecution's Brief, it is stated that the Petitioner gave receipts to the B.H.A. However, the Petitioner testified that the matters that he did give were estimates or proposals and that he left said matters in a folder in his office for B.H.A. personnel to pick up periodically even when he was not present (T. pp. 758, 763). B.H.A. personnel testifying as Prosecution witnesses clearly stated that even when they received a copy of the undated letter

from the Petitioner referring to completed work, the Petitioner told them that the work was not done (T. pp. 181-182, 305, 336, 339, 342, 345, 346, 370). A B.H.A. official, Joseph Gambino, testified as a Prosecution witness that he got what he described as receipts in a seriatim fashion (T. pp. 287-288). Gambino testified that he received from the Petitioner in December 1980, January 1981, a copy of the undated letter referring to said matters as being receipts (T. p. 303). However, of all the ten so called receipts, only one was marked as a receipt, Govt. trial Exhibit 16, but that was not in existence in January 1981. The reason that said matter might initially appear to be an estimate or receipt involved with the housing program is due to confusion rather than criminal intent. The confusion involved an electrician being paid $1,000.00 by the Petitioner for work for the Peti-

tioner at another location, and the Petitioner requesting him to provide a written estimate for repair work at the Petitioner's apartment house. The electrician, Richard Clark, testified for the Prosecution that he did work for the Petitioner at another location in which he received $1,000.00 prior to doing the work (T. p. 482-483, 488). He then worked four weeks on the project (T. p. 489), and then left the job after the Petitioner refused to give him more money (T. pp. 483. 489). He testified that at the time the Petitioner refused to give him more money, the Petitioner asked him for a receipt for the work he had done (T. pp. 483-484). He testified that he then gave the Petitioner a piece of his letterhead on which he (Clark) "signed it paid in full for $1,000.00." (T. p. 484), and then he told the Petitioner to fill in the details (T. p. 484).

Clark then identified that paper as Govt. Trial Exh. 16, which revealed four lines of typing concerning electrical work for an 88 unit apartment house, and then a typed figure of $5,800.00 and then his signature and writing stating paid in full. (T. p. 484). He testified that he did not do any of that work listed in the exhibit and that he could not recall being asked to provide any estimate for work tc be done at the Petitioner's apartment building (T. p. 485, 490). Clark identified Defense Trial Exh. C as the check he received from the Petitioner representing the $1,000.00 payment and he testified that he received that payment in February, 1981 when he started said work (T. p. 487). The check reveals a date of February 2, 1981. Thus Clark began the work in February and finished

it four weeks later in March, 1981, at which time he gave the Petitioner a receipt for the work he had done and then he stopped doing any more work. Thus, the Clark document which came into existence in March, 1981, was not in existence when the copy of the undated letter was submitted in early January, 1981.

On page 3, line 23 of the Prosecution's Brief, it is stated that the work was done at a lower price. However, Sec. 1.5(a)(2) of the A.H.A.P. contract (Count 2, Govt. trial Exh. 3) specifically states that the work could be performed at a lower cost resulting in lowered rents. Even the trial court noted that the contracts were flexible and less work resulted in less rents (T. p. 1164).

On page 4, line 13 and page 5 lines 30-35 of the Prosecution's Brief, the Prosecution alleges that the Petitioner's

trial counsel (Andrew Bowman) reviewed the files in the box prior to trial and the Prosecution further alleges that the Petitioner does not now dispute that assertion that Bowman had access to the box containing the rent calculation. However, in Petitioner's Petition For Certiorari, p. 11, lines 14-16, he clearly stated that Bowman "was shown documents set out on a table by the Prosecutor but never shown the rental calculations or any exhibits to the contracts concerning rent, nor did he mention that he ever was shown a box". In said Petition, p. 12, lines 25-27, the Petitioner also refers to the hearing testimony of the F.B.I. agent in charge of the evidence in the case and the Petitioner stated in said Petition that on "one occasion he (the F.B.I. agent) removed the Petitoner's folders from the box and brought them to an office for

Attorney Bowman to review but he could not recall telling Bowman about the box." Thus it is absolutely clear; as previously mentioned by the Petitioner in his Petition, that Bowman never saw the box, but only the folders that had been taken by the F.B.I. agent from the box in one room and then taken to another room where Bowman was located.

On page 6, third from the last line of the Prosecution's Brief, it is stated that the District Court observed that the "simple fact of the matter is that the jury found that the Petitioner made false statements". However, the key element of the crime charged was that the Prosecution was required to prove the Petitioner knowingly and willfully made these statements. As mentioned in the earlier Petition, p. 17, the crime charged is not a strict liability crime but rather requires proof of bad faith or evil intent or evil motive

or bad intent or bad purpose or evil intent without justifiable excuse.

On page 6, footnote 4, of the Prosecution's Brief it is stated that the Petitioner admitted at trial that he believed he was receiving the full subsidy. However, as mentioned in the earlier Petition, p. 6, lines 31-32, the Petitioner testifed he believed he was getting the promised 120% when he signed the first H.A.P.contract in December, 1980, which was not a subject of any count of the indictment and which was signed only 11 days after he promised to do the work. In July, 1981, when he was presented with the second H.A.P. contract (count 3) he was told he was getting lower rents and lowered units (T. pp. 1146-1148).

On page 8, lines 4-12 of the Prosecution Brief, it is asserted that the Petitioner's claim conerning the irrational jury was not properly preserved in the

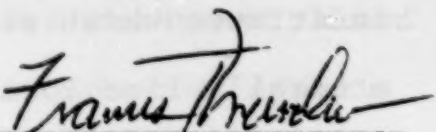
earlier direct appeal and therefore waived. However, the Petitioner could not logically raise the issue until a court, either the District Court or Court of Appeals ruled that the jury was irrational on one of the counts. Furthermore, this alleged waiver was never raised at the District Court or Court of Appeals level and thus it can be considered waived by the Prosecution.

On page 8, last 3 lines prior to conclusion, of the Prosecutions Brief, it is stated that the not guilty verdict on the fourth count contradicts the Petitioner's claim that the jury was irrational. The primary reason the jury returned a not guilty verdict on Count 4 was because the trial court excluded a written memo made by a bank employee which was the primary evidence in that count and which obviously had not be excluded from the grand jury (T. pp. 517-528). The bank

employee then testified for the Prosecution that the Petitioner orally told him that the rehabilitation work for the new Section 8 program had not yet been performed (T. p. 532),which clearly contradicted the Prosecution's claims in the indictment which stated that the Petitioner orally lied to the said bank employee by telling him that all the work had been done. Under these circumstances, it would not only be irrational but almost insane for the jury to return a guilty verdict on this count. Also, this is not like an inconsistent verdict situation where a verdict could go either way and a jury could be showing lenity by returning a not guilty verdict even though the evidence was sufficient to convict. Here, on the not guilty count, there was no evidence which could justify a conviction since the bank employee's testimony contradicted the indictment. The jury still was irrational,

and the inherent bias is not lessened since the jury could naturally feel that hitting the Petitioner with 3 felony convictions was severe enough without hitting him with another one.

RESPECTFULLY SUBMITTED,
The Petitioner

By 

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